S. Graham

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: A.R.S. Construction Company

File: B-228476

Date: January 27, 1988

DIGEST

Bid under invitation for indefinite quantity contract properly was rejected as nonresponsive on the basis that the required 20 percent bid guarantee was based on the minimum dollar value of the contract since the solicitation required a bid guarantee based on the estimated quantities stated in the solicitation.

DECISION

A.R.S. Construction Company protests the award of a contract to F2M, Inc., under invitation for bids (IFB) No. N62474-87-D-0381. The solicitation, issued by the Department of the Navy, is for an indefinite quantity of pre-engineered buildings. The protester challenges the agency's finding that A.R.S.'s bid was nonresponsive due to an inadequate bid guarantee.

We deny the protest.

The IFB listed seven bid items, with numerous subitems. The solicitation included an estimated quantity next to each subitem and spaces for a bidder to enter a unit price and an extended price (unit price times estimate) for each. The bidder then was to add its extended prices for the subitems to arrive at a total price for each bid item, and to add those prices to yield a grand total for all seven items. The low bidder was to be determined from the grand totals.

The solicitation further provided that an indefinite quantity contract, with no fixed contract price, was contemplated, and that the actual amount of work to be performed would be determined by the contracting officer during the contract period. The IFB advised, however, that a minimum of $50,000 worth of work would be ordered.

Each bidder had to furnish a 20 percent bid guarantee by the time set for opening of bids. The provision requiring the bond did not state what the percentage should be based on--it only required the guarantee to be "in the proper form and amount." However, paragraph 2.d(2) of the invitation's instructions to bidders, which stated the requirement for unit and extended prices, also advised that the extended price "is used for the purposes of establishing bonding requirements. . . ."

A.R.S., which submitted the low extended bid price of $1,620,506, furnished a $10,000 bid guarantee, that being 20 of the minimum dollar value of the contract. The Navy rejected the bid as nonresponsive on the basis that the guarantee had to be for 20 percent of the bid price of $1,620,506, which would be $324,101.

A.R.S. argues that the proper basis for the bid guarantee was the minimum value of work assured under the contract. A.R.S. notes that notwithstanding the advice in paragraph 2.d(2) that bonding requirements were to be based on extended prices, the invitation elsewhere specified that the penal sums of the required performance and payment bonds were to be based on the guaranteed minimum--equal to the guaranteed minimum for the performance bond, and half of it for the payment bond. A.R.S. argues that it is unreasonable for A.R.S. to have to furnish a bid guarantee of $324,101, but a performance bond of only $50,000 and a payment bond of only $25,000.

A.R.S. further states that on the bid opening date, before submitting its bid, the firm's principal met with the Navy Contract Specialist to clarify the amount needed for a bid guarantee, and was informed that the guarantee was to be 20 percent of the minimum dollar value of the contract. A.R.S. asserts it relied on that oral advice.

In response to the protest, the Navy argues that that provision of the solicitation specifying that the extended price was to be used for establishing the bonding requirements was clear, and points out that no other IFB provision conflicted with it. The agency further notes that the applicable Federal Acquisition Regulation (FAR) requirement, FAR § 28.1-201 (FAC 84-29), specifies that a bid guarantee must be at least 20 percent of the "bid price."

We find no legal merit to the protest. First, we think the solicitation clearly was structured to require a bid guarantee of 20 percent of the extended bid price. As stated above, the bid guarantee provision required a 20 percent bid guarantee "in the proper form and amount," and paragraph 2.d(2) specified that the extended price would be used for purposes of establishing bonding requirements. If there was any ambiguity in the bonding requirements it was in regard to the payment and performance bonds, which elsewhere in the IFB were stated to be based on the contract's minimum dollar value; neither of those are at issue here. The bid guarantee was the only remaining "bonding requirement" to which paragraph 2.d(2) could have been referring, and thus had to be 20 percent of the extended bid price.

Second, the minimum quantity stated in an invitation like this one is not directly relevant to the purpose for a bid guarantee requirement. The statement of a minimum quantity in an indefinite quantity contract is aimed at protecting the contractor by removing some of the uncertainties and risks of that contract type from the firm. See Sentinel Electronics, Inc., B-221914.2, et al., Aug. 7, 1986, 86-2 CPD ¶ 166. In contrast, the bid guarantee's purpose is to insure that the surety, and not the government, pays the excess reprocurement costs that would be incurred if the bidder failed to execute contractual documents and furnish necessary performance and payment bonds. See BKS Construction Co., B-226346, et al., May 28, 1987, 66 Comp. Gen. ___, 87-1 CPD ¶ 558.

Solicitation estimates of quantities to be ordered reflect reasonably accurate representations of anticipated needs. See Stic-Adhesive Products Co., Inc., B-227162, Sept. 25, 1987, 66 Comp. Gen. ___, 87-2 CPD ¶ 300. Where, as here, they establish that the government expects to order significantly more than the minimum, we think it is obvious that, at the time of bid submission, the problem the bid guarantee addresses is most accurately reflected in the difference between the bid prices as evaluated, which can only be protected against by bid guarantees based on the total bid prices.

In sum, we think it unreasonable for a firm to base its bid guarantee on a figure included for that firm's own protection should it win the competition, instead of on a figure that both it and the government expect will be close to the ultimate contract payment.

Finally, the Navy does not refute A.R.S.'s assertion about the advice it received from the contract specialist. Since we think the invitation was clear on the matter, however, we question the reasonableness of A.R.S.'s alleged reliance on such advice. In any case, the invitation's instructions required bidders to request any explanations or interpretations of the solicitation in writing, and warned that oral explanations would not be binding. We have held that, in the face of such advice, a bidder relies on oral explanations--especially those that are inconsistent with the solicitation's express terms--at its own risk. See, e.g., CFE Air Cargo, Inc., B-185515, Aug. 27, 1976, 76-2 CPD ¶ 198.

The protest is denied.

for Seymour Efros
James F. Hinchman
General Counsel